IN THE
SUPREME COURT OF THE UNITED STATES

OCT. Term, 1974

No. 74-111

Supreme Court, U. S.
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Case No. 1 (D.C. Civ. No. B-708)
EDMOND PFOTZER and E. JOHN PFOTZER, etc.

Petitioners,

v.

THE CITY OF NORWALK; BOWE, ALBERTSON & WALSH; BOWE-WALSH & ASSOCIATES, INC.; MURRAY G. ALBERTSON & ASSOCIATES; ALBERTSON, SHARP & ASSOCIATES; ALBERTSON, SHARP & BACKUS, INC.; JESS C. ALBERTSON AND MARINE MIDLAND GRACE TRUST COMPANY, EXECUTORS OF THE WILL OF JOHN G. ALBERTSON, DECEASED; CHARLES T. WALSH; MURRAY G. ALBERTSON; and RICHARD C. SHARP,

Respondents,

Case No. 2 (D.C. Civ. No. 13,326)
EDMOND PFOTZER and E. JOHN PFOTZER, etc.

Petitioners,

v.

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TABLE OF CONTENTS

	Page
PETITION	1
OPINION BELOW	2
QUESTION PRESENTED	11
STATEMENT	2
REASONS FOR GRANTING THE WRIT	12
ARGUMENT	
POINT I — THE BINDING COMPROMISE SETTLEMENT AGREEMENT, AS AN ACCORD, DEPRIVED THE COURT OF FURTHER JURISDICTION OF THE SUBJECT MATTER UNDER CONNECTICUT STATE LAW, WHICH THE DISTRICT COURT WAS MANDATED TO APPLY UNDER THE ERIE V. TOMPKINS DOCTRINE	12
POINT II — DEFENDANTS' ASSERTION OF COUNTERCLAIM AGAINST PLAINTIFFS FORCED PLAINTIFFS TO DEFEND	15
POINT III — DEFENDANTS' CONDUCT CONSTITUTED A FRAUD UPON THE COURT AND PLAINTIFFS	15

Page

POINT IV 16
THE COURT IS REQUIRED TO APPLY STATE LAW IN THIS DIVERSITY ACTION .....

POINT V 16
PLAINTIFFS DID NOT KNOWINGLY WAIVE THEIR RIGHTS UNDER THE AUGUST 19, 1969 SETTLEMENT AGREEMENT ..

POINT VI 17
DEFENDANTS ARE ESTOPPED FROM RELYING ON THE JUNE 2, 1972 AGREEMENT AS A DEFENSE OR RELEASE BY THEIR FRAUD ON THE PLAINTIFFS, AS DEVOLVING FROM THEIR COLLUSIVE CONCEALMENT FROM PLAINTIFFS OF THE FINALITY OF THE SETTLEMENT AGREEMENT OF AUGUST 19, 1969*.....

POINT VII 18
DEFENDANTS ARE ESTOPPED BY THEIR FRAUD ON THE COURT AND PLAINTIFFS FROM RELYING ON THE JUNE 2, 1972 AGREEMENT AS A DEFENSE OR RELEASE .....

POINT VIII 18
JUNE 2, 1972 AGREEMENT OUGHT TO BE RESCINDED, VACATED AND SET ASIDE FOR MISTAKE, FRAUD IN THE INDUCEMENT AND FAILURE OF CONSIDERATION .....

Page

POINT IX 18
ALTERNATIVELY, THE JUNE 2, 1972, STIPULATION OUGHT TO BE REFORMED TO REFLECT THE TRUE INTENT OF THE PARTIES, THAT IT WAS NOT INTENDED TO BE A GENERAL RELEASE, ETC. .....

POINT X 19
$22,000.00 OF THE JUDGMENT NOT HAVING BEEN PAID ACCORDING TO THE AGREEMENT, THE WARRANT OF SATISFACTION WAS WRONGFULLY INDUCED BY DEFENDANTS AND OUGHT TO BE CANCELLED .....

POINT XI 20
ON DEFENDANTS' MOTION TO DISMISS (IN CASE NO. 1) PRIOR TO ANSWER, THE ALLEGATIONS OF THE COMPLAINT ARE TO BE TAKEN AS TRUE, PLAINTIFFS ARE ENTITLED TO THE BENEFIT OF ALL FAVORABLE INFERENCES AND THE AFFIRMATIVE DEFENSES OF ESTOPPEL AND RES JUDICATA, NOT YET ASSERTED IN AN ANSWER, ARE NOT AVAILABLE TO DEFENDANTS .....

POINT XII 20
THE COUNTS OF THE AMENDED COMPLAINT ARE SUFFICIENT ..

Page

POINT XIII 23
RES JUDICATA IS NOT APPLICABLE WHERE THE CAUSES OF ACTION ARE NOT THE SAME AND/OR THE PRIOR JUDGMENT IS NULL AND VOID FOR LACK OF SUBJECT MATTER JURISDICTION .....
POINT XIV 24
THE BINDING COMPROMISE SETTLEMENT AGREEMENT, AS AN ACCORD, DEPRIVED THE COURT IN THE PRIOR LITIGATION OF FURTHER JURISDICTION OF THE SUBJECT MATTER, AND ITS JUDGMENT IS VOID, BARRING RES JUDICATA RELIANCE THEREON .....
POINT XV 25
DEFENDANTS' ASSERTION OF COUNTERCLAIM AGAINST PLAINTIFFS IN PRIOR LITIGATION FORCED PLAINTIFFS TO DEFEND AND DEPRIVED PLAINTIFFS OF ANY ELECTION OF REMEDIES, ESTOPPING DEFENDANTS FROM RAISING ELECTION OF REMEDIES AS A DEFENSE TO THE FIRST COUNT.....
POINT XVI 26
RELEASE RELIED ON BY DEFENDANTS WAS RESULT OF VOID PROCEEDINGS IN A COURT LACKING SUBJECT MATTER JURISDICTION AND WAS THE RESULT OF MISTAKE

Page

ON THE PART OF PLAINTIFFS, IS VOID FOR FAILURE OF CONSIDERATION, AND DOES NOT RELEASE THE CLAIMS UNDER THE SEPARATE COMPROMISE SETTLEMENT AGREEMENT .....

CONCLUSION 28

CASES .....

TAFT V. VALLEY OIL CO. (CONN. SUP. 1939) 126 CONN. 154, 9 A 2D 822 .. 7, 12, 15, 16, 21, 24

GIRASULO V. CONSOLIDATED MOTOR LINES, 5 CONN. SUP. 245 13

MILEI V. DE FRANCESCO, 12 CONN. 267 (1936) 13

AMERICAN TEXTILE MACHINE CORP. V. U.S., (6 CIR. 1955), 220 F 2d 584, ... 14

ERIE V. TOMPKINS (1938), 304 U.S. 64 ..... 12, 16

JOHNSON V. ZERBST (1938), 304 U.S. 458, 468, 82 L ED. 1441, 1466, 1468 16

LYNCH V. HOUSEHOLD FINANCE (D.C. CONN., 1973) _____F.S. _____ 9, 19, 27

OTHER AUTHORITIES

RESTATEMENT OF CONTRACTS VOLUME 417

Page

APPENDIX

JUDGMENT APPEALED FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1A

RULING AND MEMORANDUM OPINION UNITED STATES DISTRICT COURT OF CONNECTICUT (BRIDGEPORT)..... 3A

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P. O. Box 987
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Petitioners Edmond Pfotzer and E. John Pfotzer respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 15, 1974 (1A).

OPINION BELOW

No opinion was rendered by the Court of Appeals. The opinion of the District Court, unreported, appears in the Appendix below (9a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 15, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF CASE

Case No. 1: Plaintiffs* seek damages, in the First Count (First Amended Complaint, 39a)**, for breach of a settlement agreement of August 19, 1969, which settled Case No. 2, prior to trial thereof.

The Second Count (42a) sought damages for conspiracy to wrongfully withhold monies due and owing to plaintiffs, and to force plaintiffs out of business, with a claim for punitive damages.

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* Petitioners, plaintiffs in the District Court, will be referred to as "plaintiffs" for purposes of clarity, and so with "defendants".

** Appendix references are to the Appendix used in the Second Circuit, filed herewith.

The Third Count (43a) sought damages for fraud, and punitive damages.

The Fourth Count (44a) sought damages for fraud, deceit and misrepresentation, and punitive damages.

The Fifth Count (44a) sought damages for unjust enrichment.

The Sixth Count (44a) sought damages for malicious prosecution, and punitive damages.

The Seventh Count (45a) sought damages for abuse of process, and punitive damages.

Case No. 2: In Case No. 2, plaintiffs had sought and recovered a money judgment (after jury trial) in the sum of $246,768.10, with costs (115a).

Prior to trial (and prior to answer), the parties entered into a stipulation to settle the litigation by defendants paying plaintiffs the sum of $300,000.00.

After the jury verdict, plaintiffs motioned the trial court to:

1) Modify the judgment, per FRCP 60(b), to enforce the $300,000.00 settlement agreement (110a);

2) Rescind, set aside and vacate, or alternatively, reform a June 2, 1972, Stipulation of No Appeal, etc., and to cancel the Warrant of Satisfaction of Judgment, which motions were denied.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Case No. 2 (Treated first for chronological continuity):

Jury verdict in favor of plaintiffs, totalling $246,768.10, was rendered on June 2, 1972 (93a).

On the same day, the parties entered into a stipulation of no appeal (103a), conditioned on full payment of the judgment (105a), which was read into the record on June 2, 1972 (93a).

Plaintiffs were not paid the full amount of the judgment (101a, par. 12).

Plaintiffs moved to amend and modify the judgment to enforce the settlement agreement of August 19, 1969, in the amount of $300,000.00 (93a, 110a).

Plaintiffs also moved to rescind, etc., the June 2, 1972, stipulation of no appeal and to cancel the Warrant of Satisfaction of the Judgment (93a, 97a).

By order dated June 15, 1973, both motions were denied (93a, 96a) for reasons set forth in a memorandum of decision filed in Case No. 1 (9a).

Plaintiffs appealed to the Second Circuit (93a, 95a).

Case No. 1:

The complaint was filed February 2, 1973 (2a).

An Amended Complaint was filed March 13, 1973 (3a, 39a).

Defendants moved to dismiss (13a, 17a, 21a).

Plaintiffs moved for leave to take depositions on the dismissal motions (3a, 34a).

Court's opinion granting dismissal motions, dated May 15, 1973 (a), was filed May 16, 1973 (5a, 9a).

Judgment dismissing was entered May 23, 1973 (5a, 8a).

Plaintiffs appealed to the Second Circuit (5a, 6a, 7a).

FACTS

Case No. 2 (D.C. Conn. No. 13,326) is the action first in time and was a diversity action mainly for monies due plaintiffs from defendant City of Norwalk, for performance of a construction contract for said defendant City of Norwalk, coupled with other damage claims against the co-defendants, in which action the jury awarded damages to plaintiffs in the total sum of $246,768.10, with costs (93a, 115a).

After service of the complaint (based on diversity jurisdiction), and prior to answer, the

parties entered into a settlement agreement on August 19, 1969 (112a), which provided for payment to plaintiffs of the sum of $300,000.00, in consideration of plaintiffs agreeing to:

> forbear prosecution of the case at bar;
>
> withdraw the complaint;
>
> execute a general release of all claims;
>
> and assist defendants with the preparation of certain change orders in connection with their funding from government sources (112a-113a).

Shortly after this compromise settlement agreement was entered into, the defendants breached it, filing an answer and counter-claim for $110,000.00 (113a).

Plaintiffs, who were non-lawyers appearing pro se, labored under the mistake that they were required to proceed with the litigation so protracted by defendants and their attorneys, who despite their settlement agreement (113a), which they knew had binding force and effect and which terminated the litigation except to enforce the settlement agreement (113a), and which conduct (in pressing a concluded litigation with extensive discovery over a three-year period and a protracted trial of over six weeks) constituted a fraud practiced on the court, as they knew the court lacked jurisdiction of the subject matter after the settlement agreement was made (113a).

Plaintiffs relied on the above grounds in moving to enforce the settlement agreement, after judgment (110a, 112a-114a), on the ground that, after the settlement agreement was made, the court lost subject matter jurisdiction (110a-111a).

Similarly, plaintiffs moved (97a) to rescind or reform the June 2, 1972, stipulation (103a) of no appeal (entered into immediately after the jury returned the verdict for plaintiffs) and to cancel the Warrant of Satisfaction due to failure to pay $22,000.00 still due plaintiffs (101a), plaintiffs having learned that under Connecticut law, as set forth in Taft v. Valley Oil Co. (1939), 126 Conn. 154, 9 A.2d 822, the August 19, 1969 settlement was an accord and satisfaction which extinguished the original contract claim sued on and thereby deprived the trial court of subject matter jurisdiction except to enforce the settlement agreement (101a).

Both motions were denied, and plaintiffs appealed.

Case No. 1 (D.C. Civ. No. B-708) is an action founded on diversity jurisdiction (First Amended Complaint, par. 1-11; 39a-41a), wherein plaintiffs seek:

1. On the First Count, to recover damages in the sum of $201,051.90 (and continuing) for breach of the August 19, 1969, settlement agreement (First Amended Complaint, par. 1-15; 39a-42a, 45a);

2. On the Second Count, to recover damages in excess of $10,000.00 (in an amount to

be determined) for conspiracy to wrongfully withhold monies due and owing to plaintiffs and to force plaintiffs out of business, with punitive damages (First Amended Complaint, par. 16-21; 42a, 45a-46a);

3. On the Third Count, to recover damages in the sum of $201,051.90 for fraud in the inducement, with punitive damages (First Amended Complaint, par. 22-24; 43a, 46a);

4. On the Fourth Count, to recover damages in the sum of $201,051.90 for fraud, deceit and misrepresentation based on defendants' representations that:

they wanted to settle the prior litigation (Case No. 2);

that they were authorized to negotiate and to settle;

which representations were falsely made to induce plaintiffs to rely thereon,

and plaintiffs did rely thereon (First Amended Complaint, par. 25-28; 44a, 46a);

5. On the Fifth Count, to recover damages in the sum of $201,051.90 for unjust enrichment based on Counts First through Fourth (First Amended Complaint, par. 29-30; 44a, 46a);

6. On the Sixth Count, to recover damages in the minimal sum of $150,000.00 for malicious prosecution arising out of filing an

answer and sham counter-claim for $110,000.00 in an action which had been concluded by their prior settlement agreement (First Amended Complaint, par. 31-35; 44a-45a, 46a);

7. On the Seventh Count, to recover damages in the sum of $150,000.00 for abuse of process arising out of the Sixth Count (First Amended Complaint, par. 36-38; 45a, 46a).

Without answering, defendants moved to dismiss (13a-21a).

Plaintiffs moved for leave to take depositions on the dismissal motions (34a), denied sub silentio.

The dismissal motions were argued April 2, 1973 (Transcript, 47a-98a), and were granted (Opinion, 9a-12a; Judgment, 8a).

The District Court held plaintiffs were estopped to rely on the August 19, 1969, settlement agreement and that the June 2, 1972, stipulation extinguished it (Opinion, p. 3; 11a).

The District Court also held that the malicious prosecution count was released by the June 2, 1972, stipulation (Opinion, 12a), and that the failure to pay the full consideration, due to an alleged garnishment* of some funds in the

* The Connecticut statute on which the original garnishment was predicated (Conn. Gen. Stat., Sec. 52-329) was declared unconstitutional by a three-judge district court in Lynch v. Household Finance (D.C. Conn. 1973), F.S. .

hands of defendant City of Norwalk, does not "detract from the validity of the June 2 release."

Plaintiffs appealed (6a, 7a), and the appeals were consolidated.

The Second Circuit affirmed for reasons stated in Judge Newman's opinion (1A).

QUESTION PRESENTED

1. May a Federal Court, in a diversity action, dismiss a complaint contrary to controlling state court decisions on the parties substantive rights and by failing to apply applicable state law to substantive rights, contrary to the Erie v. Tompkins (304 U.S. 64) doctrine?

2. In Case No. 1, is it not error to dismiss the complaint, prior to Answer thereto, on unasserted defenses of estoppel and res judicata?

3. In Case No. 2,:

(a) are petitioners estopped from relying on a settlement agreement entered into prior to Answer by respondents?

(b) Did not the District Court lose subject matter jurisdiction when the parties entered into a settlement agreement, prior to Answer, except to enforce the settlement agreement?

REASONS FOR GRANTING THE WRIT

1. The Court below has so far deviated from this Court's declared doctrine as to call for the exercise of this Court's supervisory power over the federal judiciary.

2. The decision below is in conflict with this Court's decision in Erie v. Tompkins (1938), 304 U.S. 64, mandating, in a diversity case, the application of the state's substantive law.

ARGUMENT

POINT I

THE BINDING COMPROMISE SETTLEMENT AGREEMENT, AS AN ACCORD, DEPRIVED THE COURT OF FURTHER JURISDICTION OF THE SUBJECT MATTER UNDER CONNECTICUT STATE LAW, WHICH THE DISTRICT COURT WAS MANDATED TO APPLY UNDER THE ERIE V. TOMPKINS DOCTRINE.

The binding compromise settlement agreement, constituting an accord, concluded the prior litigation, as it extinguished the antecedent claim under controlling state law, per the Erie v. Tompkins doctrine.

Taft v. Valley Oil Co. (Conn. Sup. 1939), 126 Conn. 154, 9 A.2d 822.

The court, therefore, lost its jurisdiction of the subject matter once the compro-

mise settlement agreement was entered into as there was no longer a justiciable controversy before the court on the complaint.

In Taft v. Valley Oil Co., supra, the Connecticut Supreme Court of Errors said (at p. 825 of 9 A.2d):

> "The finding clearly shows an accord when the new contract was entered into.***If it was an accord and satisfaction, the new contract became substituted for the contingent fee contract, extinguished it and damages should have been based on the breach of the former.***In such a case the partial failure of consideration for the new contract would give the plaintiff rights under it, but would not permit him to regard it as never having come into effect and to fall back upon the breach of the original obligation as a measure of damages.***"

In Girasulo v. Consolidated Motor Lines, 5 Conn. Sup. 245, it was held that the rights of a party to a Compromise Settlement Agreement remained alive, and that the breached agreement remained effective to enforce any claim therein. Such a Compromise Settlement Agreement necessarily serves to suspend and insure the rights therein, and as such is fully capable of future enforcement.

See: Restatement of Contracts 417; Milei v. DeFrancesco, 12 Conn. 267 (1936).

In effect, these cases, supra, stand for proposition that, regardless of any Antecedent Claim, a subsequent Compromise Settlement Agreement is a consistent separate agreement and is capable of being enforced. Accordingly, a plaintiff may enforce the Compromise Settlement Agreement.

See also, American Textile Machine Corp. v. U.S., (6th Cir. 1955), 220 F.2d 584, where the Court said, at p. 589:

> "We are of the opinion that the District Judge was in error in not giving effect to the compromise settlement agreement, even though it had not been performed. Unless shown that it was not a valid contract or that it has been breached by the appellant, as distinguished from non-performance, it stands as a bar to the prosecution of the present action," (underlining supplied).

At p. 588, the Court said:

> "But it does not follow that, in the absence of default on part of the debtor, the creditor may at will rescind the accord and proceed to enforce the original obligation. If the accord is supported by consideration, and is otherwise a valid contract, it cannot be validly repudiated except for cause."

POINT II

DEFENDANTS' ASSERTION OF COUNTER-CLAIM AGAINST PLAINTIFFS FORCED PLAINTIFFS TO DEFEND.

After the Compromise Settlement Agreement was entered into, defendants breached it and filed answers containing a counter-claim against plaintiffs, asserting claims of over $100,000.00.

Defendants, by the affirmative aggressive act of filing a counter-claim for over $100,000.00 in damages, led plaintiffs to believe, and induced them to believe, that they had to continue the original litigation and defend against the sham counter-claim.

POINT III

DEFENDANTS' CONDUCT CONSTITUTED A FRAUD UPON THE COURT AND PLAINTIFFS.

Defendants, all of whom appeared by counsel, whereas plaintiffs are laymen, appearing pro se, knew the law to be that a Compromise Settlement Agreement constitutes an accord and satisfaction, and concludes the antecedent claim, and leaves only the Compromise Settlement Agreement to be enforced, but nevertheless proceeded with the litigation without advising the court of the Compromise Settlement Agreement, which deprived the court of jurisdiction of the subject matter.

Taft v. Valley Oil Co., supra.

POINT IV

THE COURT IS REQUIRED TO APPLY STATE LAW IN THIS DIVERSITY ACTION.

Erie v. Tompkins, 304 U.S. 64 (1938).

The principle of state law involved is expressed in Taft v. Valley Oil Co., supra.

POINT V

PLAINTIFFS DID NOT KNOWINGLY WAIVE THEIR RIGHTS UNDER THE AUGUST 19, 1969 SETTLEMENT AGREEMENT.

Waiver being an intentional relinquishment of a known right, plaintiffs, as non-lawyers, were not aware of their rights under the August 19, 1969 Settlement Agreement, as set forth in Taft v. Valley Oil Co., supra, and, therefore, could not have intentionally relinquished a known right.

Johnson v. Zerbst, 304 U.S. 458, 468, 82 L. Ed. 1461, 1466, 1468 (1939).

Plaintiffs were not alerted to their rights under the said agreement until immediately prior to bringing on their motion for enforcement thereof.

POINT VI

DEFENDANTS ARE ESTOPPED FROM RELYING ON THE JUNE 2, 1972 AGREEMENT AS A DEFENSE OR RELEASE BY THEIR FRAUD ON THE PLAINTIFFS, AS DEVOLVING FROM THEIR COLLUSIVE CONCEALMENT FROM PLAINTIFFS OF THE FINALITY OF THE SETTLEMENT AGREEMENT OF AUGUST 19, 1969.*

Defendants' respective counsel, during the involved protracted pre-trial proceedings were severally and jointly repetitively reminded by plaintiffs (non-lawyers) of the parties original settlement agreement of August 19, 1969. Nevertheless defendants' counsel by their repetitive collective silence and purposeful remedial inaction, coupled with their deliberate failure to timely accord the said settlement agreement, supra, its legal significance under the involved circumstances equates to a collusive act of fraudulent concealment.

* As a consequence of defendants' collusive concealment supra, four and one half years of costly litigation was thereafter forced upon plaintiffs, and during which protracted period, plaintiffs were forced out of their construction business and suffered calamitous consequential damages.

POINT VII

DEFENDANTS ARE ESTOPPED BY THEIR FRAUD ON THE COURT AND PLAINTIFFS FROM RELYING ON THE JUNE 2, 1972 AGREEMENT AS A DEFENSE OR RELEASE.

The equitable doctrine that a wrongdoer will not be allowed to benefit from his wrongoing ought to be applied to prevent defendants from relying on the June 2, 1972 agreement as a defense or a general release.

POINT VIII

JUNE 2, 1972 AGREEMENT OUGHT TO BE RESCINDED, VACATED AND SET ASIDE FOR MISTAKE, FRAUD IN THE INDUCEMENT AND FAILURE OF CONSIDERATION.

The facts clearly establish the June 2, 1972 agreement was induced by mistake, fraud in the inducement, and that there has been a failure of consideration for the agreement, any one of which elements would, by itself, justify the relief sought.

POINT IX

ALTERNATIVELY, THE JUNE 2, 1972, STIPULATION OUGHT TO BE REFORMED TO REFLECT THE TRUE INTENT OF THE PARTIES, THAT IT WAS NOT INTENDED TO BE A GENERAL RELEASE, ETC.

POINT X

$22,000.00 OF THE JUDGMENT NOT HAVING BEEN PAID ACCORDING TO THE AGREEMENT, THE WARRANT OF SATISFACTION WAS WRONGFULLY INDUCED BY DEFENDANTS AND OUGHT TO BE CANCELLED.

Connecticut General Statute Sec. 52-329 having been declared unconstitutional by a three-judge district court in Lynch v. Household Finance Corp., F.S. (D.D. Conn., 1973) after remand from the U.S. Supreme Court), defendants' prior reliance thereon in honoring a void garnish ment (attachment)* of $22,000.00

* It is material to note that November 30, 1971 was the date of service of attachment upon defendant, City of Norwalk. Pertinently, the City upon October 20, 1969, (in answer to plaintiffs' complaint in Civ. No. 13326 filed in the U.S.D.C. for the State of Connecticut) had denied it owed plaintiffs money, and additively asserted a counter-claim of $110,000.00. Said specific denial to the Court rendered void the November 30, 1971 attachment supra served upon the defendant City. The City, at all times material to its withholding of plaintiffs' $22,000.00, supra, knew, following its October 20, 1969 denial, that it could not legally satisfy said garnishment, supra. Moreover, the record shows the defendant City of Norwalk affirmatively avoided disclosing to the Superior Court of Connecticut (on return date) its October 20, 1969 denial, of plaintiffs' claims in Civ. 13326 supra and its $110,000.00 counter-claim.

of plaintiffs' funds causes a failure of consideration for the June 2, 1972 stipulation and the Warrant of Satisfaction for the judgment against defendants.

POINT XI

ON DEFENDANTS' MOTION TO DISMISS (IN CASE NO. 1) PRIOR TO ANSWER, THE ALLEGATIONS OF THE COMPLAINT ARE TO BE TAKEN AS TRUE, PLAINTIFFS ARE ENTITLED TO THE BENEFIT OF ALL FAVORABLE INFERENCES AND THE AFFIRMATIVE DEFENSES OF ESTOPPEL AND RES JUDICATA, NOT YET ASSERTED IN AN ANSWER, ARE NOT AVAILABLE TO DEFENDANTS.

Clark v. Nebersee Finanz Korporation, 322 U.S. 480, 68 S.Ct. 174, 92 L. Ed. 148 (1947).

Harrison v. Thompson, F. 2d , 15 F. R. Serv. 2d 676 (5th Cir. 1971).

Dept. and Specialty Store Emp. Union v. Brown, 284 F. 2d 619 (9th Cir. 1960).

Doherty v. Federal Stevedoring Co., 198 F. Supp. 191 (D.C.N.Y. 1961).

POINT XII

THE COUNTS OF THE AMENDED COMPLAINT ARE SUFFICIENT.

The First Count, without consideration of movants' references to matters outside of the record, sufficiently states a cause of action for breach of an enforceable compromise settlement agreement.

Taft v. Valley Oil Co., (Conn. Sup. 1939), 126 Conn. 154, 9 A. 2d 822, 825.

The following counts, 2 through 7, are not attacked specifically by movants, but each count sufficiently states a cause of action, as described hereinabove, FACTS, p. 6, 7 and 8, supra.

In Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court said:

> "In appraising the sufficiency of the complaint, we follow of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[5]"

"[5]See, e.g., Leimer v. State Mut. Life Assur. Co., 108 F.2d 302 (C.A. 8th Mo.); Dioguardi v. Durning, 139 F.2d 774 (C.A. 2d N.Y.); Continental Collieries v. Shober, 130 F.2d 631 (C.A. 3d Pa.)."

In any event, if the complaint or any of its counts are found to be insufficient, plaintiffs

should be allowed leave to amend to cure the deficiencies.

Foman v. Davis, 371 U.S. 178, 181-182, 83 S.Ct. 227, 9 L.Ed. 2d 222, 225-226.

In Foman, supra, the Court said, at p. 225 of 9 L.Ed.2d:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive in the outcome and accept the principle that the purpose of pleadings is to facilitate the proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48 2 L.Ed.2d 80-86, 78 S.Ct. 99. The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1. Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See, generally, 3 Moore, Federal Practice (2d Ed. 1948), Sec. 15.08, 15.10. If the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an

opportunity to test his claim on the merits. In the absence of any apparent or declared reason---such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the futility of the amendment, etc.--the relief sought should, as the rules require, be 'freely given."

POINT XIII

RES JUDICATA IS NOT APPLICABLE WHERE THE CAUSES OF ACTION ARE NOT THE SAME AND/OR THE PRIOR JUDGMENT IS NULL AND VOID FOR LACK OF SUBJECT MATTER JURISDICTION.

It is well settled that res judicata applies only where the prior cause of action is the same as the new cause.

The new cause herein (considering the First Count of the Amended Complaint only) is for breach of a compromise settlement agreement settling the prior litigation.

The prior litigation was an action by plaintiffs herein against defendants herein for monies due under a construction contract performed by plaintiffs for defendant City of Norwalk.

The prior or antecedent claim is clearly not the same claim as that for breach of the settlement agreement (First Count, herein).

Taft v. Valley Oil Co., (Conn. Sup. 1939), 126 Conn. 154, 9 A.2d 822.

Further, res judicata depends on a valid prior final judgment or order, not present under the pertinent circumstances herein, see Point XV, infra,

POINT XIV

THE BINDING COMPROMISE SETTLEMENT AGREEMENT, AS AN ACCORD, DEPRIVED THE COURT IN THE PRIOR LITIGATION OF FURTHER JURISDICTION OF THE SUBJECT MATTER, AND ITS JUDGMENT IS VOID, BARRING RES JUDICATA RELIANCE THEREON.

The binding compromise settlement agreement, constituting an accord, concluded the prior litigation, as it extinguished the antecedent claim.

Taft v. Valley Oil Co., supra,

In Re Thomas (Conn. Sup. 1911), Conn. , 81 A.2d 972, 973.

The court, therefore, lost its jurisdiction of the subject matter once the compromise settlement agreement was entered into as there was no longer a justiciable controversy before the court on the complaint and

its subsequent judgment is, therefore, void.

A court lacking subject matter jurisdiction cannot make a valid order or judgment (except to dismiss), and this is so even if the parties consent, as the parties cannot confer subject matter jurisdiction on a court by consent.

Any res judicata reliance on the void judgment is untenable and misplaced, as is defendants' assertion below that plaintiffs had an election of remedies.

It should be abundantly clear that plaintiffs had no election to rely on a judgment void for lack of subject matter jurisdiction.

POINT XV

DEFENDANTS' ASSERTION OF COUNTER-CLAIM AGAINST PLAINTIFFS IN PRIOR LITIGATION FORCED PLAINTIFFS TO DEFEND AND DEPRIVED PLAINTIFFS OF ANY ELECTION OF REMEDIES, ESTOPPING DEFENDANTS FROM RAISING ELECTION OF REMEDIES AS A DEFENSE TO THE FIRST COUNT.

After the compromise settlement agreement was entered into, defendants breached it and filed answers containing a counter-claim against plaintiffs, asserting claims of over $100,000.00.

Plaintiffs were thus forced to defend against this frivolous counter-claim and were thus led

to believe they had to continue the litigation.

Defendants, by the affirmative agressive act of filing a counter-claim for over $100,000.00 in damages, led plaintiffs to believe, and induced them to believe, they had to continue the original litigation and defend against the sham counter-claim. Defendants ought not to be heard now to assert the near-absurd contention that plaintiffs had an election of remedies, and, by defendants' unilateral wrongful elective act in continuing a litigation which they knew, or should have known, by operation of law, was otherwise concluded, they are estopped from using their wrongful act as a shield.

POINT XVI

RELEASE RELIED ON BY DEFENDANTS WAS RESULT OF VOID PROCEEDINGS IN A COURT LACKING SUBJECT MATTER JURISDICTION AND WAS THE RESULT OF MISTAKE ON THE PART OF PLAINTIFFS, IS VOID FOR FAILURE OF CONSIDERATION, AND DOES NOT RELEASE THE CLAIMS UNDER THE SEPARATE COMPROMISE SETTLEMENT AGREEMENT.

Defendant City of Norwalk recites a "complete release," which resulted from plaintiff's mistake, was entered into as part of proceedings which were null and void by reason of the Court's loss of subject matter jurisdiction when the parties entered into the compromise settlement agreement, and which release does

not release any claims under the compromise settlement agreement, and, further, is void for failure of consideration, the defendants having failed to pay the entire judgment to plaintiffs, as required by the agreement embodying the said "release."

Defendant City of Norwalk has retained, and still retains over $20,000.00 (due plaintiffs under the prior judgment) under a void garnishment*, the Connecticut Statutes under which the garnishment was issued, Section 52-329 having been declared unconstitutional by the Connecticut U.S. District Court (three-judge panel) in Lynch v. Household Finance Corp., Civ. Nos. 13, 737 and 13,738 (opinion filed January 12, 1973).

By virtue of this failure to pay over to plaintiffs the full amount of the judgment,

*As set forth in footnote to Point X, Page 18: on November 30, 1971, the date the attachment (garnishment) was served on defendant City of Norwalk, the City had already denied in its answer to Civ. No. 13326 in the U.S. D.C. for the State of Connecticut, that it owed money to plaintiffs, and collaterally asserted a counter-claim of $110,000.00, thus additively negating any basis for the City to withhold any funds from the plaintiffs as stemming from the June 2, 1972 judgment, and as allegedly premised on the void attachment.

there is a failure of consideration for the alleged "release," by reason of which the defendants are estopped from pleading it as a defense herein.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

Edmond Pfotzer
Petitioner, pro se

E. John Pfotzer
Petitioner, pro se

JUDGMENT APPEALED FROM

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 15th day of May one thousand nine hundred and seventy-four

Present:

HONORABLE ROBERT P. ANDERSON

HONORABLE WILFRED FEINBERG

HONORABLE WALTER R. MANSFIELD

Circuit Judges

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business under the firm name and style of E. & E.J. Pfotzer,

Plaintiff-Appellants,

NOS. 73-1885
73-2582

-against-

THE CITY OF NORWALK, et al.,

Defendant-Appellees.

Appeal from the United States District Court for the District of Connecticut .

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut , and was argued by E. John Pfotzer, pro se, and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed for the reasons stated in Judge Newman's memorandum opinions dated May 15, 1973 and June 15, 1973.

s// ROBERT P. ANDERSON

WILFRED FEINBERG

WALTER R. MANSFIELD

FILED
May 16 10:30 AM '73

CLERK
U.S. District Court
Bridgeport, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

EDMOND PFOTZER, ET AL)

V.) CIVIL NO. B-708

THE CITY OF NORWALK,)
ET AL)

RULING ON DEFENDANTS' MOTION TO DISMISS

This suit is the latest and hopefully the last round in a dispute arising out of a 1967 contract between the plaintiffs and the City of Norwalk under which the plaintiffs undertook to perform work for the City. Plaintiffs have previously sued the City and all of the defendants in this action in Civil No. 13,326 claiming substantial damages for non-payment of funds due on account of work done under the contract. After a protracted jury trial, plaintiffs won a jury verdict of $217,451.52 on June 1, 1972. The following day all parties in Civil No. 13,326 entered into an agreement which was read into the record of the prior litigation. Included in that agreement was a provision stating, with an exception not claimed to be relevant to this case, that the plaintiff "does release the defendants from any and all other claims which they have or may hereafter have in connection with or arising out of the aforesaid contract . . . ." On June 9, 1972,

judgment was entered in Civil No. 13,326 based upon the jury verdict, and on June 26, 1972, a satisfaction of judgment was entered.

Despite the foregoing, plaintiffs have filed this suit, seeking to collect substantial sums in addition to what has already been paid them. Their complaint contains seven causes of action, which in reality are different ways of expressing two claims. The first claim is that the contract dispute between the parties was, prior to trial in Civil No. 13,326 settled pursuant to a 1969 agreement whereby defendants agreed to pay the plaintiffs $300,000. Plaintiffs claim in this suit that they are entitled to the difference between the jury verdict and what they allege to be a prior settlement agreement. The second claim is for malicious prosecution. Plaintiffs allege that in Civil No. 13,326 defendants maliciously filed a frivolous counterclaim, and seek damages for the expenses of defending against the counterclaim.

Plaintiffs recognize that the judgment in Civil No. 13,326 and the subsequent release pose obstacles to their present claims, but they offer explanations to avoid defendants' motion to dismiss. They contend the 1969 agreement replaced their cause of action based on the contract claim, and that the resulting verdict and judgment based on the contract claim were invalid. They further contend that the District Court lacked subject matter jurisdiction over the contract claim.

OPINION

Even if a valid settlement agreement had been entered into in 1969, at most this would have given the plaintiffs a basis for resisting efforts by the defendants to litigate notwithstanding the agreement. For example, plaintiffs might have been able to assert the 1969 agreement as a defense to defendants counterclaim, particularly if that counterclaim had been the only claim being litigated between the parties. But plaintiffs successfully pressed their own claim against the defendants to verdict and judgment, and did not seek to litigate the validity of the 1969 agreement. In these circumstances they are estopped to contest the validity of the verdict and judgment they obtained. In any event, their argument, even if valid, would not establish their claim that the District Court lacked subject matter jurisdiction.

Plaintiffs contend they did not lose the benefit of their 1969 agreement by litigating their contract claim because they were forced to litigate in response to defendants' counterclaim. But nothing prevented them from pleading the 1969 agreement as a defense to the counterclaim. Instead, they chose to proceed with the trial, defeat the counterclaim, win a verdict and judgment on their claim, and obtain payment. Having done so, they cannot now go back to the 1969 agreement.

Even if the 1969 agreement had survived the verdict, it was totally extinguished by

the agreement the parties made on June 2, 1972. Plaintiffs, in effect, gave defendants a general release. The present claims are certainly "in connection with" the original contract within the meaning of that release.

Normally, a claim of malicious prosecution cannot be made during the litigation alleged to be maliciously brought, but must be claimed in a subsequent suit. But here the release of June 2, 1972, is broad enough to cover all aspects of plaintiffs' claims, including the claim that the counterclaim was maliciously interposed.

Finally, plaintiffs seek to avoid the effect of the June 2, 1972, release by claiming a failure of consideration. This claim is based on the fact that some of the funds owed plaintiffs by the City have subsequently been garnished in connection with unrelated litigation. In no way does such an occurrence detract from the validity of the June 2 release.

Plaintiffs have won a substantial judgment. They have been paid substantial sums. They have given defendants a general release. Their dispute with defendants, however phrased, is at an end. The motion to dismiss is granted.

OPINION

Dated at Hartford, Connecticut, this 15 day of May, 1973.

JON O. NEWMAN
Jon O. Newman
United States District Judge

MICROFILM
JUN 18 1973
NEW HAVEN

ORDER APPEALED FROM

FILED
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U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EDMOND PFOTZER, ET AL :

V. : CIVIL NO. 13,326

THE CITY OF NORWALK, ET AL :

RULING

Plaintiffs' motions to modify the judgment and to rescind the June 2, 1972, stipulation are denied for the reasons set forth in the memorandum of decision dated May 15, 1973, granting defendants' motion to dismiss in Civil No. B-708.

Dated at New Haven, Connecticut, this 15 day of June, 1973.

Jon O. Newman
United States District Judge